Rule 3.8(d) or equivalent language. The first group consists of 36 states that have adopted the Model Rule language verbatim.7 The second group is comprised of 12 jurisdictions that have adopted Model Rule 3.8(d) but made minor edits.8 Most of these edits are limited to language choice, though some add qualifications to the duties. The third group consists of two jurisdictions—Alabama and the District of Columbia—that have affirmatively added an element of intent to their Rule 3.8(d) language. The addition of this intent element, at least theoretically, dramatically changes when a prosecutor can be disciplined for failing to disclose exculpatory material. Finally, one state, California, has chosen to go it alone, not having adopted language similar to either the Model Rule or the Model Code in terms of the prosecutor's duty to disclose exculpatory material.9

Despite these differences, the fact all jurisdictions have adopted, if not the exact language, at least the substance and meaning of Rule 3.8(d) is significant. In fact, even states that have seen fit to otherwise substantially modify the Model Rule, do not eliminate section (d). Hawaii and Oregon, for example, have adopted a truncated version of Rule 3.8 with only two sections as opposed to the Model Rules' six sections, while Florida's and Kentucky's rules contain three sections.10 Despite heavily editing the rule as a whole, none of these four states changed section (d). Clearly, as a whole, learned members of state bar associations and state supreme courts across the nation, have given a resounding vote of approval to the exculpatory disclosure duties imposed upon prosecutors by Rule 3.8(d).

This, however, does not mean that the language of Rule 3.8(d) is necessarily absolutely clear, nor that the language selected by both the American Bar Association, and by 36 jurisdictions is the best or optimal language. As with any rule or statute, the language chosen, no matter how carefully and deliberately, can leave areas in need of further clarification. The issue of what is meant with "timely disclosure" and what is meant with "known to the prosecutor" are examples of such areas. Similarly, as with representative government, sometimes the minority view, no matter how small, may be the better view. These, and some other recurring issues are discussed below.

Timely Disclosure, Known to the Prosecutor, and the Element of Intent

Whether the language of Rule 3.8(d) is clear or not, the meaning of the duty imposed by the rule is clear. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."11 While this duty is all encompassing, at the very minimum it means that, as the Model Rule language states, a prosecutor must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."12 This is a simple rule. The rule's rationale is as easy to understand as is the implementation of its command.

Rationale for Rule

The literature and jurisprudence is replete with references to the rationale underlying this rule. Justice Sutherland's admonition is likely familiar to all prosecutors in Berger v. United States: that the prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."13 Clearly, if the prosecutor truly is a minister of justice, as the comments to the Model Rule and the majority of state rules hold, at a very minimum it must mean that evidence or information that exculpates the defendant cannot not be shared with the defendant. After all, the mere fact this information may have come into the possession of the prosecutor does not invest any type of proprietary rights to such information with the prosecutor. As North Dakota so wisely notes in its comments to Rule 3.8, "[d]iscovery of such information by the prosecutor confers no property right in the same upon the prosecutor; rather, in the interest of seeing that the truth is ascertained and all proceedings justly determined, the defense should be accorded ready access to any such information."14 Anything less and

the prosecutor abandons his overriding duty to ensure justice is done.

Implementation of Rule

Just as the rationale for the rule is easily understood, so is the implementation of the rule. The safest way to ensure that a prosecutor does not run afoul of the mandate of Rule 3.8(d) is simply to adopt an open file discovery policy. Constitutionally, there is no requirement that prosecutors divulge their entire files to the defense.15 However, if the proper safeguards are put into place to ensure victim and witness safety, there is no rationally justifiable reason not to adopt an open file discovery policy. While there may be advocate-based reasons for not providing open file discovery—what prosecutor has not viewed a piece of immaterial and unrelated evidence and known that if the defense was privy to it they could make smoke out of nothing and divert the attention of the jurors from the true issue before them—no minister of justice reasons or rationales exist for keeping the same irrelevant and immaterial evidence from the defense. In this instance, as in all instances, when a prosecutor's role as an advocate conflicts with his role as a minister of justice, the minister of justice role takes precedence. While a prosecutor admittedly is an advocate, indeed he should prosecute "with earnestness and vigor"16 —anything less is an abandonment of his sworn duty to protect the public, he cannot permit his advocacy duty to supplant his duty to do justice. To put this figuratively, the prosecutor's minister of justice hat is a ten-gallon Stetson; his advocate hat is a small French fedora. At all times the Stetson envelopes the Fedora.

Similarly, the danger of running afoul of Rule 3.8(d) is exponentially greater when the prosecutor engages in a piece-by-piece evaluation of what evidence the defense will be privy to and what will be withheld from the defense, and thus by extension from the fact-finder. The mere adoption of policies encouraging such thinking invariably leads prosecutors, especially less experienced prosecutors, to adopt the unfortunate us-against-them mentality. Possibly recognizing this, as prosecutors get more experienced, they generally adopt open file discovery practices regardless of what their office policy may be. As the comment to the American Bar Association Prosecution Standard 3-3.11, "Disclosure of Evidence by the Prosecutor" notes, "independent of any rules or statutes making prosecution evidence available to discovery processes, many experienced prosecutors have habitually disclosed most, if not all, of their evidence to defense counsel."17

While open file discovery is preferable in terms of the prosecutor's overriding minister of justice duty of ensuring that justice is done, open file discovery is also preferable in terms of the prosecutor's individual professional protection in ensuring he inadvertently does not run afoul of Rule 3.8(d). This is especially so in light of the fact that in a majority of jurisdictions, were the prosecutor to make an honest and good faith mistake in his piecemeal determination of what to disclose and what not to disclose, he would be subject to discipline pursuant to Rule 3.8(d). As such, out of all the language differences in Rule 3.8(d) across the nation, the issue of intent may be the most significant.

Rule 3.8(d) and Intent

Model Rule 3.8(d) is silent in terms of whether a prosecutor who unintentionally makes a good faith mistake in failing to turn over exculpatory material to the defense should be subject to discipline. Theoretically, in 48 of the 51 jurisdictions, such a prosecutor could face disciplinary proceedings. In two jurisdictions, however (Alabama and the District of Columbia), the applicable 3.8(d) rule language precludes such a disciplinary proceeding. Similarly, the Colorado Supreme Court has read an intent element into Colorado's Rule 3.8(d). As such, a Colorado prosecutor who negligently and knowingly, but not intentionally, fails to turn over clearly exculpatory material, would not be subject to discipline.

Alabama

Alabama Rule 3.8(d) reads:

(1) The Prosecutor in a criminal case shall:
(d) not willfully fail to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.18

By adding the words "not willfully fail" to the Model Rule language, Alabama seems to indicate that it does not want an otherwise honorable prosecutor who makes an honest good faith mistake in failing to disclose exculpatory evidence to be subject to discipline. The comment to the rule emphasizes this point, noting that "[t]he disciplinary standard is limited to a willful failure to make the required disclosure."19 (Emphasis supplied.) Although Alabama does not define "willful," and adopts the Model Rules' "knowing" definition of denoting "actual knowledge of the fact in question,"20 it is hard to conceive of a situation in which an Alabama prosecutor who knowingly violated Rule 3.8(d) would not be subject to discipline. This is how it should be. However, at least in Alabama, the opposite is also true: an Alabama prosecutor who inadvertently and unintentionally fails to disclose exculpatory material, will not be subject to discipline.

District of Columbia

The District of Columbia, sporting the most unique and comprehensive of all the "Special Responsibilities of a Prosecutor" rules, also exhibits a reluctance to subject the inadvertent failure to disclose exculpatory material to the disciplinary process. In fact, the District's version of Model Rule 3.8(d), uses the word "intentionally" twice, once in the guilt clause and then again in the sentencing clause. While this may be more due to drafting symmetry then anything else, in the absence of the word "intentionally" in any of the other jurisdictions' Rule 3.8(d) versions, the District's wording invites attention in a comparison study. (Other unique aspects of the District of Columbia's rule include its inclusion of the otherwise discredited "upon request" requirement, its peculiar wording in terms of timeliness, and, in a separate sub-section (h), the laudable extension of the duty to disclose exculpatory evidence to the grand jury—all discussed below.) The District of Columbia's Rule 3.8(e) thus reads:

The Prosecutor in a Criminal Case Shall Not:
(d) Intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or, in connection with sentencing, intentionally fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.21

Unlike Alabama, the District of Columbia does not address the issue of intent or willfulness further in the comments to the rule. Yet, with the District being the only jurisdiction to go so far as to include the word "intentionally" in the plain language of its rule, however, there really is no need to do so. Absent a finding that a prosecutor acted "intentionally" in failing to disclose exculpatory material to the defense, that prosecutor will not be subject to discipline.

Colorado

Both Alabama and the District of Columbia are unique in that they include either a "willful"

or "intentional" requirement in their exculpatory disclosure rule. They are, however, not the only jurisdictions to incorporate this concept as a bar to the discipline of nonintentional failure to disclose exculpatory material. The Colorado Supreme Court did just this in 2002. Colorado falls in the majority group of jurisdictions that have adopted Model Rule 3.8(d) verbatim. The Colorado Supreme Court, however, when faced with a factual scenario in which the same prosecutor twice failed to timely disclose exculpatory material, declined to impose discipline because the prosecutor had not acted intentionally.22

The Colorado Supreme Court noted three points in what was their first interpretation of Rule 3.8(d), all of which could arguably be relevant in other jurisdictions facing similar fact scenarios. The first was that the Colorado attorney disciplinary system was designed to emphasize prevention and the protection of the public as opposed to punishment.23 The second was the concern that the court was stepping in to what could be termed a discovery dispute. With this in mind, the court quoted from the preamble to the Colorado Rules of Professional Conduct that "the purpose of the rules 'can be subverted when they are invoked by opposing parties as procedural weapons.'"24 Finally, considering this, the court reasoned that only the most serious discovery violations should be dealt with through the attorney grievance system.25 In this context, yet also squarely facing two clear violations of Rule 3.8(d), the court "decline[d] to find a violation of Rule 3.8(d) because [the prosecutor's] conduct was not intentional."26

Rule 3.8(d) and Intent: Open Question

The Colorado Supreme Court's opinion twice made reference to the fact that the American Bar Association also incorporates an intent element in their applicable prosecution standard. The language of ABA Prosecution Standard 3-3.11, "Disclosure of Evidence by the Prosecutor," substantially tracks the Model Rule 3.8(d) language, with the notable exception that the prosecution standard states that "[a] prosecutor should not intentionally fail to make timely disclosure..." of exculpatory evidence.27 Considering that the Colorado Supreme Court was the first high court to address intent in relation to what is the majority version of Rule 3.8(d), and considering the ABA Prosecution Standard's clear vote of approval of incorporating intent into the rule, other state high courts with identical rules would have been expected to come to the same conclusion, thus possibly establishing a trend towards incorporating intent in the interpretation of Model Rule 3.8(d). This has not proven to be the case, however. In fact, the only other state supreme court to address the issue head on subsequent to the Colorado case came to the opposite conclusion.

In a 2004 Louisiana case, the Louisiana Disciplinary Board found a "technical" violation of Rule 3.8(d) on the part of the prosecutor in failing to disclose exculpatory material. However, partly based upon the prosecutor's "good faith and lack of intent,"28 the board found discipline was not warranted and dismissed the formal charges against the prosecutor.29 The Louisiana Supreme Court, however, reversed, and based upon its de novo finding of a "knowing" violation of Rule 3.8(d), imposed a three-month suspension of the practice of law.30

All prosecutors should be aware of these different approaches with regard to intent and the discipline of prosecutors pursuant to Rule 3.8(d). Additionally, prosecutors who practice in Model Rules language states should not only be aware that two jurisdictions include an intent element in this rule, but also that two state supreme courts reviewing identical language, came to starkly opposite conclusions.31

Timely Disclosure

The Model Rule mandates that a prosecutor "make timely disclosure" to the defense of exculpatory information.32 No guidance in terms of what "timely" means is provided in the comments to the rule. The Model Code used the same language, speaking in terms of making "timely disclosure" to counsel for the defense.33 In fact, 48 of the 51 jurisdictions

choose this terminology34 Presumably the common belief is that prosecutors would, as recommended by the National District Attorneys Association, develop general policies and procedures to "give guidance in the exercise of prosecutorial discretion."35 Certainly when to turn over exculpatory material known to the prosecutor would fall into this category. While neither the rules nor case law proscribe a definite road map in terms of timeliness, and while the optimal rule would mandate disclosure upon discovery or as reasonably possibly thereafter, two state variations of Rule 3.8(d) provide some guidance.

North Dakota, possibly building upon its laudable view of the prosecutor not having a proprietary interest in exculpatory material,36 has edited the Model Rule language to read that a prosecutor shall "disclose to the defense at the earliest practical time all evidence or information known to the prosecutor that tends to negate the guilt of the accused..."37 This is an improvement upon the Model Rule language. There should be an impetus upon prosecutors to not only provide exculpatory material, but to do so posthaste. After all, if the disclosure is done at a point when the defense cannot adequately review and incorporate the exculpatory material into their preparation for trial, the disclosure has been nothing but an exercise in meaningless procedural compliance. The District of Columbia's version of this duty, the second variation of the majority rule, recognizes this by mandating that the disclosure of exculpatory material shall be done "at a time when use by the defense is reasonably feasible."38 No prosecutor should permit the tactical advantage he may gain as an advocate through a delayed withholding of exculpatory material to supplant his overriding duty as a minister of justice. The minority rule with regard to the timeliness of turning over exculpatory material is the better rule.

Known to the Prosecutor

Regardless of when exculpatory material is disclosed, the Model Rule mandates that "all evidence or information known to the prosecutor that tends to negate the guilt of the defendant or mitigates the offense" be disclosed.39 The second clause makes the same "known to the prosecutor" qualification for sentencing mitigating information.40 Just as with the timeliness issue, the Model Rule provides little if any guidance in terms of what this "known" qualification means. Unlike the timeliness issue, however, the knowing area is one where a careful distinction has to be drawn between the context of whether a defendant's due process rights have been violated as a result of a prosecutor's failure to disclose exculpatory material, and whether a prosecutor should be subject to discipline due to such a failure.

The Supreme Court has made clear, and common sense supports this reasoning, that in order to fulfill his constitutional duty under Brady v. Maryland,41 a prosecutor is responsible for disclosing to the defense not only evidence he knows about, but also information that is in the possession of other prosecutors in his office,42 as well as information that is in the possession of law enforcement involved in the case.43 In other words, information the prosecutor should know about must also be disclosed. Were it any other way, a prosecutor could shirk his duties under Brady of ensuring the defendant is afforded a trial decided upon the "basis of all the evidence which exposes the truth"44 by failing to ensure he himself knows about all such pertinent evidence. Deliberate ignorance can never be part of an ethical prosecutor's modus operandi.

This duty of a prosecutor to learn of exculpatory material that may be in the possession of law enforcement can easily be met through the establishment and implementation of procedures and polices. At the very minimum such policies should require prosecutors to inquire of the police as to the existence of exculpatory material, and when appropriate, physically review the police files. Blind faith that police investigators always tell the prosecution everything is both misplaced and naïve.45 However, in a case where the prosecutor has met his inquiry obligation, yet for reasons beyond his control remains unaware of exculpatory material, while this should not preclude a defendant from arguing his constitutional rights have been violated, it should preclude finding a 3.8(d) violation on the part of the prosecutor for having failed to disclose information "known" to him that might exculpate the defendant. In other words, in certain instances a distinction has to be

made between a constitutional violation and a rule violation. In terms of Rule 3.8(d), this is such an instance.

Possibly recognizing that this may not be an issue that will frequently occur, all but two jurisdictions use the Model Rule's "known" wording without modification or explanation. Two jurisdictions, however, have added the qualifier "or reasonably should know" to their knowing language. Thus both Louisiana and the District of Columbia mandate that their prosecutors disclose to the defense all material that the prosecutor "knows, or reasonably should know" is exculpatory.46 Neither jurisdiction provides an explanation for this deviation from the Model Rule. However, in looking at the definitions of knows and reasonably should know, it becomes clear the District of Columbia and Louisiana are holding their prosecutors to a higher standard than the rest of the jurisdictions. Both the District of Columbia and Louisiana (as do the Model Rules), define knows as "denot[ing] actual knowledge of the fact in question."47 And, although such actual knowledge can be "inferred from circumstances," reasonably should know, "denotes that a lawyer of reasonable prudence and competence would ascertain the matter."48 In Louisiana and the District of Columbia, a prosecutor can thus no longer claim as a defense to a Rule 3.8(d) challenge that he did not know about the existence of exculpatory material, or that he did not recognize the exculpatory nature of a known piece of evidence. If another "reasonably pruden[t] and competen[t]" prosecutor would have either known of the evidence or known of its exculpatory nature, the prosecutor who did not could be deemed to have violated Rule 3.8(d) in these jurisdictions.

Louisiana and the District of Columbia have thus raised the bar in terms of the knowing component of their Rule 3.8(d) duties. This is not necessarily a bad thing. If nothing else, it may encourage prosecutors to not only, in the words of the Supreme Court, "resolve doubtful questions in favor of disclosure,"49 but also take a more proactive approach in ferreting out exculpatory material from law enforcement. Additionally, these changes might also encourage the adoption of open file discovery. If so, with regard to the knowing requirement, as with the intent element and the timeliness issue, the minority could possibly be viewed as the better approach.

Grand Jury and Rule 3.8(d)

While the District of Columbia is joined by Louisiana with regard to the knowing issue, it alone clarifies a prosecutor's duty to disclose exculpatory material to the grand jury. Section (g) of the District's Rule 3.8 prohibits a prosecutor from intentionally interfering with the independence of the grand jury, preempting the grand jury's function, abusing the grand jury process, or "fail[ing] to bring to the attention of the grand jury material facts tending substantially to negate the existence of probable cause."50 This requirement is not included in the Model Rules, nor in any of the state variations. Interestingly, the comment to Model Rule 3.8 used to include a reference to Rule 3.3's ("Candor toward the Tribunal") duty to inform a tribunal of all adverse facts in an ex parte proceeding, thus suggesting that same held true in the grand jury setting. This reference to Rule 3.3 was, however, excised in 2002 based upon the grand jury not being an "ex parte" setting per se.51

The deletion of the cross-reference between Rule 3.8(d) (disclosure of exculpatory material) and Rule 3.3(d) (providing material facts to the tribunal in an ex parte proceeding) was thus seemingly founded upon definitional grounds as opposed to policy reasons. In fact, both the United States Attorney's Manual and the ABA Prosecution Standards support the District of Columbia's minority view. The United States Attorney's Manual holds that it is the policy of the Department of Justice to present "substantial evidence that directly negates the guilt of a subject of the investigation" when the prosecutor conducting the grand jury investigation is personally aware of such evidence.52 Similarly, ABA Prosecution Standard 3-3.6(b), "Quality and Scope of Evidence Before Grand Jury," affirmatively recommends that "[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or

mitigate the offense."53

While the District of Columbia stands alone among the state level jurisdictions in making it a rule violation for a prosecutor not to disclose exculpatory material that tends to negate the existence of probable cause to the grand jury, all prosecutors need to be aware that if the exculpatory evidence is of such a magnitude as to negate probable cause in its entirety, bringing forth a prosecution under such circumstances would be a violation of the duty not to prosecute a charge that "the prosecutor knows is not supported by probable cause."54 Setting aside the rules, in practical terms it also makes little sense for a prosecutor to withhold exculpatory material from the grand jury. If a prosecutor is worried that the disclosure of exculpatory material will prevent him from obtaining a true bill from the grand jury in a setting in which he substantially controls the proceedings and the presentation of evidence, then certainly he should be worried about obtaining a conviction before the petit jury where his evidence is tested by the adversary process. Again, the minority view is the better view.

Upon Request

All prosecutors should be familiar with the so-called Brady line of cases outlining the prosecutor's duty to disclose exculpatory material to the defense. In five cases spanning three decades, the Supreme Court provided both the rationale and the extent of this duty.55 While the opinions focused upon the extent of the duty and whether a defendant's constitutional rights have been violated as a result of a violation of this duty, courts interpreting the disclosure duties mandated by Rule 3.8(d) generally look to this case law for guidance. As such, there is a large and obvious overlap between the constitutional and the professional aspects of disclosing exculpatory material. In this regard, one point needs to be emphasized. The Court's 1963 holding in Brady v. Maryland that the prosecutor's duty to disclose exculpatory material is dependent upon a request from the defense, is no longer valid. The duty to disclose is very much an affirmative duty. That this is so in terms of constitutional error has been clear since the Supreme Court in United States v. Agurs noted that there is no difference between a general request for exculpatory material and a no-request situation.56

The same holds true in terms of the prosecutor's professional duty. This can be seen from the fact that only one jurisdiction, the District of Columbia, maintains the now uniformly abandoned and discredited "upon request" language.57 This is an instance where the majority version of Rule 3.8(d) is clearly in the right. The prosecutor's duty to disclose exculpatory material stems from his overall duty as a minister of justice to ensure that the proceedings he institutes and conducts are fair. The defense counsel is to a large extent irrelevant in this regard. Whether the prosecutor fulfills his duty should not and does not depend upon the quality or aggressiveness of defense counsel. The duty to disclose exculpatory material is both a constitutional and a professional affirmative duty on the part of the prosecutor. It has to be fulfilled independently and regardless of what defense counsel may or may not do or request.

Conclusion

The prosecutor wears two hats: that of an advocate and that of a minister of justice. As a minister of justice the prosecutor is charged with many duties, all of which converge towards him ensuring that justice is done. The singular duty encompassed in Rule 3.8(d) of the Rules of Professional Conduct—that of disclosing exculpatory material to the defense—is perhaps paramount among all of these duties. While all rules of professional conduct are important, and while some rules are admittedly more important than others to the prosecutor, no rule cuts directly to the core of the prosecutor's minister of justice duty as does Rule 3.8(d). This article has sought to provide information and insight into this duty by discussing the various jurisdictions' versions of this rule. While the goal of this article is not to pontificate as to what version is better than other versions—the author agrees with Justice Blackmun that it may be better to allow the states to maintain

"different approaches" to complex ethical questions58—prosecutors reading this article may nevertheless take note of some of the more significant differences. Setting aside the differences, it is hoped that the article as a whole sheds some useful light on the parameters of the duty encompassed in Rule 3.8(d). It is a duty that can never be over-emphasized. The forthcoming and final installment in this series of articles on the prosecutor's ethical and professional duties will discuss the remaining sections of Rule 3.8, including a look at the newly adopted language dealing with the prosecutor's duties to remedy wrongful convictions.

Endnotes

1 Rule 12, 1887 Code of Ethics of the Alabama State Bar Association, reprinted in Gilded Age Legal Ethics: Essays on Thomas Goode Jones' 1887 Code 50 (Occasional Publications of the Bounds Law Library, University of Alabama School of Law 2003).

2 Canons of Professional Ethic (1908) Canon 5, reprinted in Opinions of the Committee on Professional Ethics and Grievances 3 (American Bar Association 1957).

3 Model Code of Prof'L Responsibility DR 7-103(B) (1983), reprinted in Regulations of Lawyers: Statutes and Standards 3 (Aspen Publishers 2003). [Hereinafter Model Code.]

4 Model rules of Professional Conduct Rule 3.8(d) (2007), at www.abanet.org/cpr/mrpc/rule_3_8.html (last visited Jan. 21, 2008). [Hereinafter Model Rules].

5 See id., Rule 3.8(b). See also Illinois Rules of Prof'l Conduct, Rule. 3.8, Maine Bar Rules, Rule 3.7, and Ohio rules of Prof'l Conduct, Rule 3.8. Ohio succinctly explains in the comments to her Rule 3.8 that sub-section (b) of the Model Rules is "deleted because ensuring that the defendant is advised about the right to counsel is a police and judicial function and because Rule 4.3 sets forth duties of all lawyers in dealing with unrepresented persons." Ohio rules of Prof'l Conduct, Rule 3.8 cmt.

6 Only 13 states (AZ, DE, ID, IN, IO, LA, NE, NV, NJ, NC, ND, SC and SD) have adopted Model Rule 3.8(f) verbatim.

7 The 36 states that have adopted Model Rule 3.8(d) verbatim are: AK, AZ, AR, CO, CN, DE, FL, HI, ID, IN, IO, KS, KY, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NC, OK, OR, PA, RI, SC, SD, TX, VT, WA, WV, WI and WY.

8 The 12 states that have made minor edits to the language of Model Rule 3.8(d) are: GE, IL, ME, ND, NJ, NY, OH, TN, UT, VA, NM and LA. Note that although New York remains a Model Code jurisdiction, there is no fundamental difference between its DR 1-703(b) language and the Model Rule 3.8(d) language. New York does, however, in its EC 7-13 join the District of Columbia in also mandating that prosecutors may not intentionally avoid the pursuit of evidence merely because they believe it may lead to exculpatory evidence. See District of Columbia Rules of Prof'L Conduct, Rule 3.8(d).

9 California has not adopted either the Model Rule or the Model Code language. Prosecutors in California instead need to look to Rules 5-110 – Performing the Duty of Member in Government Service and 5-220 – Suppression of Evidence of the California Rules of Professional Conduct, as well as any applicable sections in the California Business & Professions Code.

10 See Hawaii Rules of Prof'L Conduct, Rule 3.8, Oregon Rules of Prof'L Conduct, Rule 3.8, Florida Rules of Prof'L Conduct, Rule 3.8, and Kentucky Rules of Prof'L Conduct,

Rule 3.8.

11 Model Rules, cmt. 1, supra note 4.

12 Model Rules , Rule 3.8(d), supra note 4 (emphasis supplied).

13 Berger v. United States, 295 U.S. 78, 88 (1935).

14 North Dakota rules of Prof'l Conduct, Rule 3.8 cmt.

15 United States v. Agurs, 427 U.S. 97, 109 (1976) ("Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much.")

16 Berger, 295 U.S. at 88.

17 Standards for Criminal Justice Prosecution Function and Defense Function, Prosecution Function Standard 3-3.11 – Disclosure of Evidence by the Prosecutor (American Bar Association, 3rd ed. 1993). [Hereinafter ABA Prosecution Standards].

18 Alabama Rules of Prof'l Conduct, Rule 3.8(d) (emphasis supplied).

19 Id., cmt.

20 Id., terminology.

21 District of Columbia Rules of Prof'L Conduct, Rule 3.8(e) (emphasis supplied).

22 In the Matter of Attorney, 47 P.3rd 1167 (Colo. 2002).

23 Id. at 1174, citing to Linda Donnellyet al., How the New Attorney Regulation System Will Work, 28 Colo. Law. 57, 59 (Feb. 1999).

24 In the Matter of Attorney, 47 P.3rd at 1174.

25 Id.

26 Id. (emphasis supplied).

27 ABA Prosecution Standard 3-3.11, supra note 16.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CONNICK, DISTRICT ATTORNEY, ET AL. *v.* THOMPSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09–571. Argued October 6, 2010—Decided March 29, 2011

Petitioner the Orleans Parish District Attorney's Office concedes that, in prosecuting respondent Thompson for attempted armed robbery, prosecutors violated *Brady* v. *Maryland*, 373 U. S. 83, by failing to disclose a crime lab report. Because of his robbery conviction, Thompson elected not to testify at his later murder trial and was convicted. A month before his scheduled execution, the lab report was discovered. A reviewing court vacated both convictions, and Thompson was found not guilty in a retrial on the murder charge. He then filed suit against the district attorney's office under 42 U. S. C. §1983, alleging, *inter alia*, that the *Brady* violation was caused by the office's deliberate indifference to an obvious need to train prosecutors to avoid such constitutional violations. The district court held that, to prove deliberate indifference, Thompson did not need to show a pattern of similar *Brady* violations when he could demonstrate that the need for training was obvious. The jury found the district attorney's office liable for failure to train and awarded Thompson damages. The Fifth Circuit affirmed by an equally divided court.

Held: A district attorney's office may not be held liable under §1983 for failure to train its prosecutors based on a single *Brady* violation. Pp. 6–20.

(a) Plaintiffs seeking to impose §1983 liability on local governments must prove that their injury was caused by "action pursuant to official municipal policy," which includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 691. A local government's decision not to train certain employees about their

Syllabus

legal duty to avoid violating citizens' rights may rise to the level of an official government policy for §1983 purposes, but the failure to train must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton* v. *Harris*, 489 U. S. 378, 388. Deliberate indifference in this context requires proof that city policymakers disregarded the "known or obvious consequence" that a particular omission in their training program would cause city employees to violate citizens' constitutional rights. *Board of Comm'rs of Bryan Cty.* v. *Brown*, 520 U. S. 397, 410. Pp. 6–9.

(b) A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference. *Bryan Cty., supra*, at 409. Without notice that a course of training is deficient, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights. Thompson does not contend that he proved a pattern of similar *Brady* violations, and four reversals by Louisiana courts for dissimilar *Brady* violations in the 10 years before the robbery trial could not have put the district attorney's office on notice of the need for specific training. Pp. 9–10.

(c) Thompson mistakenly relies on the "single-incident" liability hypothesized in *Canton*, contending that the *Brady* violation in his case was the "obvious" consequence of failing to provide specific *Brady* training and that this "obviousness" showing can substitute for the pattern of violations ordinarily necessary to establish municipal culpability. In *Canton*, the Court theorized that if a city armed its police force and deployed them into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force, the failure to train could reflect the city's deliberate indifference to the highly predictable consequence, namely, violations of constitutional rights. Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability. The obvious need for specific legal training present in *Canton*'s scenario—police academy applicants are unlikely to be familiar with constitutional constraints on deadly force and, absent training, cannot obtain that knowledge—is absent here. Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. They receive training before entering the profession, must usually satisfy continuing education requirements, often train on the job with more experienced attorneys, and must satisfy licensing standards and ongoing ethical obligations. Prosecutors not only are equipped but are ethically bound to know what *Brady* entails and to perform legal research

Syllabus

when they are uncertain. Thus, recurring constitutional violations are not the "obvious consequence" of failing to provide prosecutors with formal in-house training. The nuance of the allegedly necessary training also distinguishes the case from the example in *Canton*. Here, the prosecutors were familiar with the general *Brady* rule. Thus, Thompson cannot rely on the lack of an ability to cope with constitutional situations that underlies the *Canton* hypothetical, but must assert that prosecutors were not trained about particular *Brady* evidence or the specific scenario related to the violation in his case. That sort of nuance simply cannot support an inference of deliberate indifference here. Contrary to the holding below, it does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts, as it must, to "a decision by the city itself to violate the Constitution." *Canton*, 489 U. S., at 395 (O'Connor, J., concurring in part and dissenting in part). Pp. 11–19.

578 F. 3d 293, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion, in which ALITO, J., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 09–571

HARRY F. CONNICK, DISTRICT ATTORNEY, ET AL., PETITIONERS *v.* JOHN THOMPSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[March 29, 2011]

JUSTICE THOMAS delivered the opinion of the Court.

The Orleans Parish District Attorney's Office now concedes that, in prosecuting respondent John Thompson for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over to the defense under *Brady* v. *Maryland*, 373 U. S. 83 (1963). Thompson was convicted. Because of that conviction Thompson elected not to testify in his own defense in his later trial for murder, and he was again convicted. Thompson spent 18 years in prison, including 14 years on death row. One month before Thompson's scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory, and both of Thompson's convictions were vacated.

After his release from prison, Thompson sued petitioner Harry Connick, in his official capacity as the Orleans Parish District Attorney, for damages under Rev. Stat. §1979, 42 U. S. C. §1983. Thompson alleged that Connick had failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of

training had caused the nondisclosure in Thompson's robbery case. The jury awarded Thompson $14 million, and the Court of Appeals for the Fifth Circuit affirmed by an evenly divided en banc court. We granted certiorari to decide whether a district attorney's office may be held liable under §1983 for failure to train based on a single *Brady* violation. We hold that it cannot.

I

A

In early 1985, John Thompson was charged with the murder of Raymond T. Liuzza, Jr. in New Orleans. Publicity following the murder charge led the victims of an unrelated armed robbery to identify Thompson as their attacker. The district attorney charged Thompson with attempted armed robbery.

As part of the robbery investigation, a crime scene technician took from one of the victims' pants a swatch of fabric stained with the robber's blood. Approximately one week before Thompson's armed robbery trial, the swatch was sent to the crime laboratory. Two days before the trial, assistant district attorney Bruce Whittaker received the crime lab's report, which stated that the perpetrator had blood type B. There is no evidence that the prosecutors ever had Thompson's blood tested or that they knew what his blood type was. Whittaker claimed he placed the report on assistant district attorney James Williams' desk, but Williams denied seeing it. The report was never disclosed to Thompson's counsel.

Williams tried the armed robbery case with assistant district attorney Gerry Deegan. On the first day of trial, Deegan checked all of the physical evidence in the case out of the police property room, including the blood-stained swatch. Deegan then checked all of the evidence but the swatch into the courthouse property room. The prosecutors did not mention the swatch or the crime lab report at

trial, and the jury convicted Thompson of attempted armed robbery.

A few weeks later, Williams and special prosecutor Eric Dubelier tried Thompson for the Liuzza murder. Because of the armed robbery conviction, Thompson chose not to testify in his own defense. He was convicted and sentenced to death. *State* v. *Thompson*, 516 So. 2d 349 (La. 1987). In the 14 years following Thompson's murder conviction, state and federal courts reviewed and denied his challenges to the conviction and sentence. See *State ex rel. Thompson* v. *Cain*, 95–2463 (La. 4/25/96), 672 So. 2d 906; *Thompson* v. *Cain*, 161 F. 3d 802 (CA5 1998). The State scheduled Thompson's execution for May 20, 1999.

In late April 1999, Thompson's private investigator discovered the crime lab report from the armed robbery investigation in the files of the New Orleans Police Crime Laboratory. Thompson was tested and found to have blood type O, proving that the blood on the swatch was not his. Thompson's attorneys presented this evidence to the district attorney's office, which, in turn, moved to stay the execution and vacate Thompson's armed robbery conviction.[1] The Louisiana Court of Appeals then reversed Thompson's murder conviction, concluding that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense at the murder trial. *State* v. *Thompson*, 2002–0361 (La. App. 7/17/02), 825 So. 2d 552. In 2003, the district attorney's office

[1]After Thompson discovered the crime lab report, former assistant district attorney Michael Riehlmann revealed that Deegan had confessed to him in 1994 that he had "intentionally suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant." Record EX583; see also *id.*, at 2677. Deegan apparently had been recently diagnosed with terminal cancer when he made his confession. Following a disciplinary complaint by the district attorney's office, the Supreme Court of Louisiana reprimanded Riehlmann for failing to disclose Deegan's admission earlier. *In re Riehlmann*, 2004–0680 (La. 1/19/05), 891 So. 2d 1239.

retried Thompson for Liuzza's murder.[2] The jury found him not guilty.

B

Thompson then brought this action against the district attorney's office, Connick, Williams, and others, alleging that their conduct caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed. The only claim that proceeded to trial was Thompson's claim under §1983 that the district attorney's office had violated *Brady* by failing to disclose the crime lab report in his armed robbery trial. See *Brady*, 373 U. S. 83. Thompson alleged liability under two theories: (1) the *Brady* violation was caused by an unconstitutional policy of the district attorney's office; and (2) the violation was caused by Connick's deliberate indifference to an obvious need to train the prosecutors in his office in order to avoid such constitutional violations.

Before trial, Connick conceded that the failure to produce the crime lab report constituted a *Brady* violation.[3] See Record EX608, EX880. Accordingly, the District Court instructed the jury that the "only issue" was whether the nondisclosure was caused by either a policy, practice, or custom of the district attorney's office or a deliberately indifferent failure to train the office's prosecutors. Record 1615.

Although no prosecutor remembered any specific training session regarding *Brady* prior to 1985, it was undisputed at trial that the prosecutors were familiar with the

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[2]Thompson testified in his own defense at the second trial and presented evidence suggesting that another man committed the murder. That man, the government's key witness at the first murder trial, had died in the interval between the first and second trials.

[3]Because Connick conceded that the failure to disclose the crime lab report violated *Brady*, that question is not presented here, and we do not address it.

general *Brady* requirement that the State disclose to the defense evidence in its possession that is favorable to the accused. Prosecutors testified that office policy was to turn crime lab reports and other scientific evidence over to the defense. They also testified that, after the discovery of the undisclosed crime lab report in 1999, prosecutors disagreed about whether it had to be disclosed under *Brady* absent knowledge of Thompson's blood type.

The jury rejected Thompson's claim that an unconstitutional office policy caused the *Brady* violation, but found the district attorney's office liable for failing to train the prosecutors. The jury awarded Thompson $14 million in damages, and the District Court added more than $1 million in attorney's fees and costs.

After the verdict, Connick renewed his objection—which he had raised on summary judgment—that he could not have been deliberately indifferent to an obvious need for more or different *Brady* training because there was no evidence that he was aware of a pattern of similar *Brady* violations. The District Court rejected this argument for the reasons that it had given in the summary judgment order. In that order, the court had concluded that a pattern of violations is not necessary to prove deliberate indifference when the need for training is "so obvious." No. Civ. A. 03–2045 (ED La., Nov. 15, 2005), App. to Pet. for Cert. 141a, 2005 WL 3541035, *13. Relying on *Canton* v. *Harris*, 489 U. S. 378 (1989), the court had held that Thompson could demonstrate deliberate indifference by proving that "the DA's office knew to a moral certainty that assistan[t] [district attorneys] would acquire *Brady* material, that without training it is not always obvious what *Brady* requires, and that withholding *Brady* material will virtually always lead to a substantial violation of constitutional rights."[4] App. to Pet. for Cert. 141a, 2005

[4]The District Court rejected Connick's proposed deliberate indiffer-

WL 3541035, *13.

A panel of the Court of Appeals for the Fifth Circuit affirmed. The panel acknowledged that Thompson did not present evidence of a pattern of similar *Brady* violations, 553 F. 3d 836, 851 (2008), but held that Thompson did not need to prove a pattern, *id.*, at 854. According to the panel, Thompson demonstrated that Connick was on notice of an obvious need for *Brady* training by presenting evidence "that attorneys, often fresh out of law school, would undoubtedly be required to confront *Brady* issues while at the DA's Office, that erroneous decisions regarding *Brady* evidence would result in serious constitutional violations, that resolution of *Brady* issues was often unclear, and that training in *Brady* would have been helpful." 553 F. 3d, at 854.

The Court of Appeals sitting en banc vacated the panel opinion, granted rehearing, and divided evenly, thereby affirming the District Court. 578 F. 3d 293 (CA5 2009) *(per curiam)*. In four opinions, the divided en banc court disputed whether Thompson could establish municipal liability for failure to train the prosecutors based on the single *Brady* violation without proving a prior pattern of similar violations, and, if so, what evidence would make that showing. We granted certiorari. 559 U. S. ___ (2010).

II

The *Brady* violation conceded in this case occurred when one or more of the four prosecutors involved with Thompson's armed robbery prosecution failed to disclose the crime lab report to Thompson's counsel. Under Thompson's failure-to-train theory, he bore the burden of proving both (1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the need to

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ence jury instruction—which would have required Thompson to prove a pattern of similar violations—for the same reasons as the summary judgment motion. Tr. 1013; Record 993; see also Tr. of Oral Arg. 26.

train the prosecutors about their *Brady* disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the *Brady* violation in this case. Connick argues that he was entitled to judgment as a matter of law because Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training. We agree.[5]

A

Title 42 U. S. C. §1983 provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the

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[5] Because we conclude that Thompson failed to prove deliberate indifference, we need not reach causation. Thus, we do not address whether the alleged training deficiency, or some other cause, was the "'moving force,'" *Canton* v. *Harris*, 489 U. S. 378, 389 (1989) (quoting *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 694 (1978), and *Polk County* v. *Dodson*, 454 U. S. 312, 326 (1981)), that "actually caused" the failure to disclose the crime lab report, *Canton*, *supra*, at 391.

The same cannot be said for the dissent, however. Affirming the verdict in favor of Thompson would require finding both that he proved deliberate indifference and that he proved causation. Perhaps unsurprisingly, the dissent has not conducted the second step of the analysis, which would require showing that the failure to provide particular training (which the dissent never clearly identifies) "actually caused" the flagrant—and quite possibly intentional—misconduct that occurred in this case. See *post*, at 21 (opinion of GINSBURG, J.) (assuming that, "[h]ad *Brady*'s importance been brought home to prosecutors," the violation at issue "surely" would not have occurred). The dissent believes that evidence that the prosecutors allegedly "misapprehen[ded]" *Brady* proves causation. *Post*, at 27, n. 20. Of course, if evidence of a need for training, by itself, were sufficient to prove that the lack of training "actually caused" the violation at issue, no causation requirement would be necessary because every plaintiff who satisfied the deliberate indifference requirement would necessarily satisfy the causation requirement.

> United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

A municipality or other local government may be liable under this section if the governmental body itself "subjects" a person to a deprivation of rights or "causes" a person "to be subjected" to such deprivation. See *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 692 (1978). But, under §1983, local governments are responsible only for "their *own* illegal acts." *Pembaur* v. *Cincinnati*, 475 U. S. 469, 479 (1986) (citing *Monell*, 436 U. S., at 665–683). They are not vicariously liable under §1983 for their employees' actions. See *id.*, at 691; *Canton*, 489 U. S., at 392; *Board of Comm'rs of Bryan Cty.* v. *Brown*, 520 U. S. 397, 403 (1997) (collecting cases).

Plaintiffs who seek to impose liability on local governments under §1983 must prove that "action pursuant to official municipal policy" caused their injury. *Monell*, 436 U. S., at 691; see *id.*, at 694. Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. See *ibid.*; *Pembaur*, *supra*, at 480–481; *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 167–168 (1970). These are "action[s] for which the municipality is actually responsible." *Pembaur*, *supra*, at 479–480.

In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of §1983. A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.

See *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 822–823 (1985) (plurality opinion) ("[A] 'policy' of 'inadequate training'" is "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*"). To satisfy the statute, a municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton*, 489 U. S., at 388. Only then "can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under §1983." *Id.*, at 389.

"'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bryan Cty.*, 520 U. S., at 410. Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. *Id.*, at 407. The city's "policy of inaction" in light of notice that its program will cause constitutional violations "is the functional equivalent of a decision by the city itself to violate the Constitution." *Canton*, 489 U. S., at 395 (O'Connor, J., concurring in part and dissenting in part). A less stringent standard of fault for a failure-to-train claim "would result in *de facto respondeat superior* liability on municipalities . . . ." *Id.*, at 392; see also *Pembaur*, *supra*, at 483 (opinion of Brennan, J.) ("[M]unicipal liability under §1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by [the relevant] officials . . .").

B

A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate

deliberate indifference for purposes of failure to train. *Bryan Cty.*, 520 U. S., at 409. Policymakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." *Id.*, at 407. Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

Although Thompson does not contend that he proved a pattern of similar *Brady* violations, 553 F. 3d, at 851, vacated, 578 F. 3d 293 (en banc), he points out that, during the ten years preceding his armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office.[6] Those four reversals could not have put Connick on notice that the office's *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here. None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.[7]

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[6]Thompson had every incentive at trial to attempt to establish a pattern of similar violations, given that the jury instruction allowed the jury to find deliberate indifference based on, among other things, prosecutors' "history of mishandling" similar situations. Record 1619.

[7]Thompson also asserts that this case is not about a "single incident" because up to four prosecutors may have been responsible for the nondisclosure of the crime lab report and, according to his allegations, withheld additional evidence in his armed robbery and murder trials. But contemporaneous or subsequent conduct cannot establish a pattern of violations that would provide "notice to the cit[y] and the opportunity to conform to constitutional dictates . . . ." *Canton*, 489 U. S., at 395

C

1

Instead of relying on a pattern of similar *Brady* violations, Thompson relies on the "single-incident" liability that this Court hypothesized in *Canton*. He contends that the *Brady* violation in his case was the "obvious" consequence of failing to provide specific *Brady* training, and that this showing of "obviousness" can substitute for the pattern of violations ordinarily necessary to establish municipal culpability.

In *Canton*, the Court left open the possibility that, "in a narrow range of circumstances," a pattern of similar violations might not be necessary to show deliberate indifference. *Bryan Cty.*, *supra*, at 409. The Court posed the hypothetical example of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. *Canton*, *supra*, at 390, n. 10. Given the known frequency with which police attempt to arrest fleeing felons and the "predictability that an officer lacking specific tools to handle that situation will violate citizens' rights," the Court theorized that a city's decision not to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the "highly predictable consequence," namely, violations of constitutional rights. *Bryan Cty.*, *supra*, at 409. The Court sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under §1983 without proof of a pre-existing pattern of violations.

(O'Connor, J., concurring in part and dissenting in part). Moreover, no court has ever found any of the other *Brady* violations that Thompson alleges occurred in his armed robbery and murder trials.

Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability. The obvious need for specific legal training that was present in the *Canton* scenario is absent here. Armed police must sometimes make split-second decisions with life-or-death consequences. There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training. In stark contrast, legal "[t]raining is what differentiates attorneys from average public employees." 578 F. 3d, at 304–305 (opinion of Clement, J.).

Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both. See, *e.g.*, La. State Bar Assn. (LSBA), Articles of Incorporation, La. Rev. Stat. Ann. §37, ch. 4, App., Art. 14, §7 (1988 West Supp.) (as amended through 1985). These threshold requirements are designed to ensure that all new attorneys have learned how to find, understand, and apply legal rules. Cf. *United States* v. *Cronic*, 466 U. S. 648, 658, 664 (1984) (noting that the presumption "that the lawyer is competent to provide the guiding hand that the defendant needs" applies even to young and inexperienced lawyers in their first jury trial and even when the case is complex).

Nor does professional training end at graduation. Most jurisdictions require attorneys to satisfy continuing-education requirements. See, *e.g.*, LSBA, Articles of Incorporation, Art. 16, Rule 1.1(b) (effective 1987); La. Sup.

Ct. Rule XXX (effective 1988). Even those few jurisdictions that do not impose mandatory continuing-education requirements mandate that attorneys represent their clients competently and encourage attorneys to engage in continuing study and education. See, *e.g.*, Mass. Rule Prof. Conduct 1.1 and comment 6 (West 2006). Before Louisiana adopted continuing-education requirements, it imposed similar general competency requirements on its state bar. LSBA, Articles of Incorporation, Art. 16, EC 1–1, 1–2, DR 6–101 (West 1974) (effective 1971).

Attorneys who practice with other attorneys, such as in district attorney's offices, also train on the job as they learn from more experienced attorneys. For instance, here in the Orleans Parish District Attorney's Office, junior prosecutors were trained by senior prosecutors who supervised them as they worked together to prepare cases for trial, and trial chiefs oversaw the preparation of the cases. Senior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments.

In addition, attorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession's standards. See, *e.g.*, LSBA, Articles of Incorporation, Art. 14, §7 (1985); see generally *id.*, Art. 16 (1971) (Code of Professional Responsibility). Trial lawyers have a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland* v. *Washington*, 466 U. S. 668, 688 (1984). Prosecutors have a special "duty to seek justice, not merely to convict." LSBA, Articles of Incorporation, Art. 16, EC 7–13 (1971); ABA Standards for Criminal Justice 3–1.1(c) (2d ed. 1980). Among prosecutors' unique ethical obligations is the duty to produce *Brady* evidence to the defense. See, *e.g.*, LSBA, Articles of Incorporation, Art. 16, EC 7–13 (1971); ABA Model Rule of Prof. Conduct

3.8(d) (1984).[8] An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment. See, *e.g.*, LSBA, Articles of Incorporation, Art. 15, §§5, 6 (1971); *id.*, Art. 16, DR 1–102; ABA Model Rule of Prof. Conduct 8.4 (1984).

In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the "obvious consequence" of failing to provide prosecutors with formal in-house training about how to obey the law. *Bryan Cty.*, 520 U. S., at 409. Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the ab-

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[8]The Louisiana State Bar Code of Professional Responsibility included a broad understanding of the prosecutor's duty to disclose in 1985:

"With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused." LSBA, Articles of Incorporation, Art. 16, EC 7–13 (1971); see also ABA Model Rule of Prof. Conduct 3.8(d) (1984) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . .").

In addition to these ethical rules, the Louisiana Code of Criminal Procedure, with which Louisiana prosecutors are no doubt familiar, in 1985 required prosecutors, upon order of the court, to permit inspection of evidence "favorable to the defendant . . . which [is] material and relevant to the issue of guilt or punishment," La. Code Crim. Proc. Ann., Art. 718 (West 1981) (added 1977), as well as "any results or reports" of "scientific tests or experiments, made in connection with or material to the particular case" if those reports are exculpatory or intended for use at trial, *id.*, Art. 719.

sence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in "the usual and recurring situations with which [the prosecutors] must deal."[9] *Canton*, 489 U. S., at 391. A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same "highly predictable" constitutional danger as *Canton*'s untrained officer.

A second significant difference between this case and the example in *Canton* is the nuance of the allegedly necessary training. The *Canton* hypothetical assumes that the armed police officers have no knowledge at all of the constitutional limits on the use of deadly force. But it is undisputed here that the prosecutors in Connick's office were familiar with the general *Brady* rule. Thompson's complaint therefore cannot rely on the utter lack of an ability to cope with constitutional situations that underlies the *Canton* hypothetical, but rather must assert that prosecutors were not trained about particular *Brady* evidence or the specific scenario related to the violation in his case. That sort of nuance simply cannot support an inference of deliberate indifference here. As the Court said in *Canton*, "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." 489 U. S., at 392 (citing *Tuttle*, 471 U. S., at 823 (plurality opinion)).

Thompson suggests that the absence of any *formal* training sessions about *Brady* is equivalent to the complete absence of legal training that the Court imagined in

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[9] Contrary to the dissent's assertion, see *post*, at 31, n. 26 (citing *post*, at 18–20), a prosecutor's youth is not a "specific reason" not to rely on professional training and ethical obligations. See *supra*, at 12 (citing *United States* v. *Cronic*, 466 U. S. 648, 658, 664 (1984)).

Canton. But failure-to-train liability is concerned with the substance of the training, not the particular instructional format. The statute does not provide plaintiffs or courts *carte blanche* to micromanage local governments throughout the United States.

We do not assume that prosecutors will always make correct *Brady* decisions or that guidance regarding specific *Brady* questions would not assist prosecutors. But showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability. "[P]rov[ing] that an injury or accident could have been avoided if an [employee] had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct" will not suffice. *Canton*, *supra*, at 391. The possibility of single-incident liability that the Court left open in *Canton* is not this case.[10]

2

The dissent rejects our holding that *Canton*'s hypothesized single-incident liability does not, as a legal matter, encompass failure to train prosecutors in their *Brady* obligation. It would instead apply the *Canton* hypothetical to this case, and thus devotes almost all of its opinion to explaining why the evidence supports liability under that theory.[11] But the dissent's attempt to address our

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[10] Thompson also argues that he proved deliberate indifference by "direct evidence of policymaker fault" and so, presumably, did not need to rely on circumstantial evidence at all. Brief for Respondent 37. In support, Thompson contends that Connick created a "culture of indifference" in the district attorney's office, *id.*, at 38, as evidenced by Connick's own allegedly inadequate understanding of *Brady*, the office's unwritten *Brady* policy that was later incorporated into a 1987 handbook, and an officewide "restrictive discovery policy," Brief for Respondent 39–40. This argument is essentially an assertion that Connick's office had an unconstitutional policy or custom. The jury rejected this claim, and Thompson does not challenge that finding.

[11] The dissent spends considerable time finding new *Brady* violations

holding—by pointing out that not all prosecutors will necessarily have enrolled in criminal procedure class—misses the point. See *post*, at 29–30. The reason why the *Canton* hypothetical is inapplicable is that attorneys, unlike police officers, are equipped with the tools to find,

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in Thompson's trials. See *post*, at 3–13. How these violations are relevant even to the dissent's own legal analysis is "a mystery." *Post*, at 4, n. 2. The dissent does not list these violations among the "[a]bundant evidence" that it believes supports the jury's finding that *Brady* training was obviously necessary. *Post*, at 16. Nor does the dissent quarrel with our conclusion that contemporaneous or subsequent conduct cannot establish a pattern of violations. The only point appears to be to highlight what the dissent sees as sympathetic, even if legally irrelevant, facts.

In any event, the dissent's findings are highly suspect. In finding two of the "new" violations, the dissent belatedly tries to reverse the Court of Appeals' 1998 decision that those *Brady* claims were "without merit." Compare *Thompson* v. *Cain*, 161 F. 3d 802, 806–808 (CA5) (rejecting *Brady* claims regarding the Perkins-Liuzza audiotapes and the Perkins police report), with *post*, at 8–9 (concluding that these were *Brady* violations). There is no basis to the dissent's suggestion that materially new facts have called the Court of Appeals' 1998 decision into question. Cf. *State* v. *Thompson*, 2002–0361, p. 6 (La. App. 7/17/02), 825 So. 2d 552, 555 (noting Thompson's admission that some of his current *Brady* claims "ha[ve] been rejected by both the Louisiana Supreme Court and the federal courts"). Regarding the blood-stained swatch, which the dissent asserts prosecutors "blocked" the defense from inspecting by sending it to the crime lab for testing, *post*, at 6, Thompson's counsel conceded at oral argument that trial counsel had access to the evidence locker where the swatch was recorded as evidence. See Tr. of Oral Arg. 37, 42; Record EX42, EX43 (evidence card identifying "One (1) Piece of Victims [*sic*] Right Pants Leg, W/Blood" among the evidence in the evidence locker and indicating that some evidence had been checked out); Tr. 401 (testimony from Thompson's counsel that he "[w]ent down to the evidence room and checked all of the evidence"); *id.*, at 103, 369–370, 586, 602 (testimony that evidence card was "available to the public," would have been available to Thompson's counsel, and would have been seen by Thompson's counsel because it was stapled to the evidence bag in "the normal process"). Moreover, the dissent cannot seriously believe that the jury could have found *Brady* violations—indisputably, questions of law. See *post*, at 12, n. 10, 15, n. 11.

interpret, and apply legal principles.

By the end of its opinion, however, the dissent finally reveals that its real disagreement is not with our holding today, but with this Court's precedent. The dissent does not see "any reason," *post*, at 31, for the Court's conclusion in *Bryan County* that a pattern of violations is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train, 520 U. S., at 409. Cf. *id.*, at 406–408 (explaining why a pattern of violations is ordinarily necessary). But cf. *post*, at 30–31 (describing our reliance on *Bryan County* as "imply[ing]" a new "limitation" on §1983). As our precedent makes clear, proving that a municipality itself actually caused a constitutional violation by failing to train the offending employee presents "difficult problems of proof," and we must adhere to a "stringent standard of fault," lest municipal liability under §1983 collapse into *respondeat superior*.[12] *Bryan County*, 520 U. S., at 406, 410; see *Canton*, 489 U. S., at 391–392.

3

The District Court and the Court of Appeals panel erroneously believed that Thompson had proved deliberate indifference by showing the "obviousness" of a need for additional training. They based this conclusion on Connick's awareness that (1) prosecutors would confront

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[12]Although the dissent acknowledges that "deliberate indifference liability and *respondeat superior* liability are not one and the same," the opinion suggests that it believes otherwise. *Post*, at 32, n. 28; see, *e.g.*, *post*, at 32 (asserting that "the buck stops with [the district attorney]"); *post*, at 23 (suggesting municipal liability attaches when "the prosecutors" themselves are "deliberately indifferent to what the law requires"). We stand by the longstanding rule—reaffirmed by a unanimous Court earlier this Term—that to prove a violation of §1983, a plaintiff must prove that "the municipality's own wrongful conduct" caused his injury, not that the municipality is ultimately responsible for the torts of its employees. *Los Angeles County* v. *Humphries*, *ante*, at 9; see *Humphries*, *ante*, at 6, 7 (citing *Monell*, 436 U. S., at 691).

Brady issues while at the district attorney's office; (2) inexperienced prosecutors were expected to understand *Brady*'s requirements; (3) *Brady* has gray areas that make for difficult choices; and (4) erroneous decisions regarding *Brady* evidence would result in constitutional violations. 553 F. 3d, at 854; App. to Pet. for Cert. 141a, 2005 WL 3541035, *13. This is insufficient.

It does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to "a decision by the city itself to violate the Constitution." *Canton*, 489 U. S., at 395 (O'Connor, J., concurring in part and dissenting in part). To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was "highly predictable" that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that it was *so* predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants' *Brady* rights. See *Bryan Cty.*, 520 U. S., at 409; *Canton*, *supra*, at 389. He did not do so.

III

The role of a prosecutor is to see that justice is done. *Berger* v. *United States*, 295 U. S. 78, 88 (1935). "It is as much [a prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Ibid.* By their own admission, the prosecutors who tried Thompson's armed robbery case failed to carry out that responsibility. But the only issue before us is whether Connick, as the policymaker for the district attorney's office, was deliberately indifferent to the need to train the attorneys under his authority.

We conclude that this case does not fall within the

narrow range of "single-incident" liability hypothesized in *Canton* as a possible exception to the pattern of violations necessary to prove deliberate indifference in §1983 actions alleging failure to train. The District Court should have granted Connick judgment as a matter of law on the failure-to-train claim because Thompson did not prove a pattern of similar violations that would "establish that the 'policy of inaction' [was] the functional equivalent of a decision by the city itself to violate the Constitution." *Canton, supra,* at 395 (opinion of O'Connor, J.).

The judgment of the United States Court of Appeals for the Fifth Circuit is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 09–571

HARRY F. CONNICK, DISTRICT ATTORNEY, ET AL., PETITIONERS *v.* JOHN THOMPSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[March 29, 2011]

JUSTICE SCALIA, with whom JUSTICE ALITO joins, concurring.

I join the Court's opinion in full. I write separately only to address several aspects of the dissent.

1. The dissent's lengthy excavation of the trial record is a puzzling exertion. The question presented for our review is whether a municipality is liable for a single *Brady* violation by one of its prosecutors, even though no pattern or practice of prior violations put the municipality on notice of a need for specific training that would have prevented it. See *Brady* v. *Maryland*, 373 U. S. 83 (1963). That question is a legal one: whether a *Brady* violation presents one of those rare circumstances we hypothesized in *Canton*'s footnote 10, in which the need for training in constitutional requirements is so obvious *ex ante* that the municipality's failure to provide that training amounts to deliberate indifference to constitutional violations. See *Canton* v. *Harris*, 489 U. S. 378, 390, n. 10 (1989).

The dissent defers consideration of this question until page 23 of its opinion. It first devotes considerable space to allegations that Connick's prosecutors misunderstood *Brady* when asked about it at trial, see *post*, at 16–18 (opinion of GINSBURG, J.), and to supposed gaps in the *Brady* guidance provided by Connick's office to prosecutors, including deficiencies (unrelated to the specific *Brady*

violation at issue in this case) in a policy manual published by Connick's office three years after Thompson's trial, see *post*, at 18–21. None of that is relevant. Thompson's failure-to-train theory at trial was not based on a pervasive culture of indifference to *Brady*, but rather on the inevitability of mistakes over enough iterations of criminal trials. The District Court instructed the jury it could find Connick deliberately indifferent if:

> "First: The District Attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the constitution to be provided to an accused[;]
> "Second: The situation involved a difficult choice, or one that prosecutors had a history of mishandling, such that additional training, supervision, or monitoring was clearly needed[; and]
> "Third: The wrong choice by a prosecutor in that situation will frequently cause a deprivation of an accused's constitutional rights." App. 828.

That theory of deliberate indifference would repeal the law of *Monell*[1] in favor of the Law of Large Numbers. *Brady* mistakes are inevitable. So are all species of error routinely confronted by prosecutors: authorizing a bad warrant; losing a *Batson*[2] claim; crossing the line in closing argument; or eliciting hearsay that violates the Confrontation Clause. Nevertheless, we do not have "*de facto respondeat superior* liability," *Canton*, 489 U. S., at 392, for each such violation under the rubric of failure-to-train simply because the municipality does not have a professional educational program covering the specific violation in sufficient depth.[3] Were Thompson's theory the law,

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[1] *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658 (1978).

[2] *Batson* v. *Kentucky*, 476 U. S. 79 (1986).

[3] I do not share the dissent's confidence that this result will be avoided by the instruction's requirement that "'more likely than not the

there would have been no need for *Canton*'s footnote to confine its hypothetical to the extreme circumstance of arming police officers with guns without telling them about the constitutional limitations upon shooting fleeing felons; the District Court's instructions cover every recurring situation in which citizens' rights can be violated.

That result cannot be squared with our admonition that failure-to-train liability is available only in "limited circumstances," *id.*, at 387, and that a pattern of constitutional violations is "ordinarily necessary to establish municipal culpability and causation," *Board of Comm'rs of Bryan Cty.* v. *Brown*, 520 U. S. 397, 409 (1997). These restrictions are indispensable because without them, "failure to train" would become a talismanic incantation producing municipal liability "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee"—which is what *Monell* rejects. *Canton*, 489 U. S., at 392. Worse, it would "engage the federal courts in an endless exercise of second-guessing municipal employee-training programs," thereby diminishing the autonomy of state and local governments. *Ibid.*

2. Perhaps for that reason, the dissent does not seriously contend that Thompson's theory of recovery was proper. Rather, it accuses Connick of acquiescing in that theory at trial. See *post*, at 25. The accusation is false. Connick's central claim was and is that failure-to-train

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Brady material would have been produced if the prosecutors involved in his underlying criminal cases had been properly trained, supervised or monitored regarding the production of *Brady* evidence.'" *Post*, at 25, n. 17 (quoting Tr. 1100). How comforting that assurance is depends entirely on what proper training consists of. If it is not limited to training in aspects of *Brady* that have been repeatedly violated, but includes—as the dissent would have it include here—training that would avoid any one-time violation, the assurance is no assurance at all.

liability for a *Brady* violation cannot be premised on a single incident, but requires a pattern or practice of previous violations. He pressed that argument at the summary judgment stage but was rebuffed. At trial, when Connick offered a jury instruction to the same effect, the trial judge effectively told him to stop bringing up the subject:

> "[Connick's counsel]: Also, as part of that definition in that same location, Your Honor, we would like to include language that says that deliberate indifference to training requires a pattern of similar violations and proof of deliberate indifference requires more than a single isolated act.
>
> "[Thompson's counsel]: That's not the law, Your Honor.
>
> "THE COURT: No, I'm not giving that. That was in your motion for summary judgment that I denied." Tr. 1013.

Nothing more is required to preserve a claim of error. See Fed. Rule Civ. Proc. 51(d)(1)(B).[4]

3. But in any event, to recover from a municipality under 42 U. S. C. §1983, a plaintiff must satisfy a "rigorous" standard of causation, *Bryan Cty.*, 520 U. S., at 405; he must "demonstrate a direct causal link between the

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[4]The dissent's contention that "[t]he instruction Connick proposed resembled the charge given by the District Court," *post*, at 25, n. 18, disregards his requested instruction concerning the necessity of a pattern of prior violations. It is meaningless to say that after "the court rejected [Connick's] categorical position," as it did, he did not "assail the District Court's formulation of the deliberate indifference instruction," *post*, at 26, n. 18. The prior-pattern requirement was *part* of Connick's requested formulation of deliberate indifference: "To *prove deliberate indifference*, a plaintiff must demonstrate 'at least a pattern of similar violations arising from training that is so clearly inadequate as to be obviously likely to result in a constitutional violation.'" Record, Doc. 94, p. 18 (emphasis added).

municipal action and the deprivation of federal rights." *Id.*, at 404. Thompson cannot meet that standard. The withholding of evidence in his case was almost certainly caused not by a failure to give prosecutors specific training, but by miscreant prosecutor Gerry Deegan's willful suppression of evidence he believed to be exculpatory, in an effort to railroad Thompson. According to Deegan's colleague Michael Riehlmann, in 1994 Deegan confessed to him—in the same conversation in which Deegan revealed he had only a few months to live—that he had "suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant." App. 367; see also *id.*, at 362 ("[Deegan] told me . . . that he had failed to inform the defense of exculpatory information"). I have no reason to disbelieve that account, particularly since Riehlmann's testimony hardly paints a flattering picture of himself: Riehlmann kept silent about Deegan's misconduct for another five years, as a result of which he incurred professional sanctions. See *In re Riehlmann*, 2004–0680 (La. 1/19/05), 891 So. 2d 1239. And if Riehlmann's story is true, then the "moving force," *Bryan Cty.*, *supra,* at 404 (internal quotation marks omitted), behind the suppression of evidence was Deegan, not a failure of continuing legal education.

4. The dissent suspends disbelief about this, insisting that with proper *Brady* training, "surely at least one" of the prosecutors in Thompson's trial would have turned over the lab report and blood swatch. *Post*, at 21. But training must consist of more than mere broad encomiums of *Brady:* We have made clear that "the identified deficiency in a city's training program [must be] closely related to the ultimate injury." *Canton*, *supra*, at 391. So even indulging the dissent's assumption that Thompson's prosecutors failed to disclose the lab report *in good faith*—in a way that could be prevented by training—what sort of

training would have prevented the good-faith nondisclosure of a blood report not known to be exculpatory?

Perhaps a better question to ask is what *legally accurate* training would have prevented it. The dissent's suggestion is to instruct prosecutors to ignore the portion of *Brady* limiting prosecutors' disclosure obligations to evidence that is "favorable to an accused," 373 U. S., at 87. Instead, the dissent proposes that "Connick could have communicated to Orleans Parish prosecutors, in no uncertain terms, that, '[i]f you have physical evidence that, if tested, can establish the innocence of the person who is charged, you have to turn it over.'" *Post*, at 20, n. 13 (quoting Tr. of Oral Arg. 34). Though labeled a training suggestion, the dissent's proposal is better described as a *sub silentio* expansion of the substantive law of *Brady*. If any of our cases establishes such an obligation, I have never read it, and the dissent does not cite it.[5]

Since Thompson's trial, however, we have decided a case that appears to say just the opposite of the training the dissent would require: In *Arizona* v. *Youngblood*, 488 U. S. 51, 58 (1988), we held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." We acknowledged that "*Brady* . . . makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence," but concluded that "the

[5] What the dissent *does* cite in support of its theory comes from an unexpected source: Connick's testimony about what qualifies as *Brady* material. See *post*, at 20–21, n. 13. ("Or Connick could have told prosecutors what he told the jury when he was asked whether a prosecutor must disclose a crime lab report to the defense, even if the prosecutor does not know the defendant's blood type: 'Under the law, it qualifies as *Brady* material.'" (quoting Tr. 872)). Given the effort the dissent has expended persuading us that Connick's understanding of *Brady* is profoundly misguided, its newfound trust in his expertise on the subject is, to the say the least, surprising.

Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.*, at 57. Perhaps one day we will recognize a distinction between good-faith failures to preserve from destruction evidence whose inculpatory or exculpatory character is unknown, and good-faith failures to turn such evidence over to the defense. But until we do so, a failure to train prosecutors to observe that distinction cannot constitute deliberate indifference.

5. By now the reader has doubtless guessed the best-kept secret of this case: There was probably no *Brady* violation at all—except for Deegan's (which, since it was a bad-faith, knowing violation, could not possibly be attributed to lack of training).[6] The dissent surely knows this, which is why it leans heavily on the fact that Connick conceded that *Brady* was violated. I can honor that concession in my analysis of the case because even if it extends beyond Deegan's deliberate actions, it remains irrelevant to Connick's training obligations. For any *Brady* violation apart from Deegan's was surely on the very frontier of our *Brady* jurisprudence; Connick could not possibly have been on notice decades ago that he was required to instruct his prosecutors to respect a right to untested evidence that we had not *(and still have not)*

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[6]The dissent's only response to this is that the jury must have found otherwise, since it was instructed that "'[f]or liability to attach because of a failure to train, the fault must be in the training program itself, not in any particular prosecutor.'" *Post*, at 28, n. 20 (quoting Tr. 1098). But this instruction did not require the jury to find that Deegan did not commit a bad-faith, knowing violation; it merely prevented the jury from finding that, if he did so, Connick was liable for a failure to train. I not only agree with that; it is part of my point.

recognized. As a consequence, even if I accepted the dissent's conclusion that failure-to-train liability could be premised on a single *Brady* error, I could not agree that the lack of an accurate training regimen caused the violation Connick has conceded.

SUPREME COURT OF THE UNITED STATES

No. 09–571

HARRY F. CONNICK, DISTRICT ATTORNEY, ET AL., PETITIONERS *v.* JOHN THOMPSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[March 29, 2011]

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

In *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963), this Court held that due process requires the prosecution to turn over evidence favorable to the accused and material to his guilt or punishment. That obligation, the parties have stipulated, was dishonored in this case; consequently, John Thompson spent 18 years in prison, 14 of them isolated on death row, before the truth came to light: He was innocent of the charge of attempted armed robbery, and his subsequent trial on a murder charge, by prosecutorial design, was fundamentally unfair.

The Court holds that the Orleans Parish District Attorney's Office (District Attorney's Office or Office) cannot be held liable, in a civil rights action under 42 U. S. C. §1983, for the grave injustice Thompson suffered. That is so, the Court tells us, because Thompson has shown only an aberrant *Brady* violation, not a routine practice of giving short shrift to *Brady*'s requirements. The evidence presented to the jury that awarded compensation to Thompson, however, points distinctly away from the Court's assessment. As the trial record in the §1983 action reveals, the conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical.

From the top down, the evidence showed, members of

the District Attorney's Office, including the District Attorney himself, misperceived *Brady*'s compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutors' conduct relating to Thompson's trials, a fact trier could reasonably conclude that inattention to *Brady* was standard operating procedure at the District Attorney's Office.

What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility under §1983.

I dissent from the Court's judgment mindful that *Brady* violations, as this case illustrates, are not easily detected. But for a chance discovery made by a defense team investigator weeks before Thompson's scheduled execution, the evidence that led to his exoneration might have remained under wraps. The prosecutorial concealment Thompson encountered, however, is bound to be repeated unless municipal agencies bear responsibility—made tangible by §1983 liability—for adequately conveying what *Brady* requires and for monitoring staff compliance. Failure to train, this Court has said, can give rise to municipal liability under §1983 "where the failure . . . amounts to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Canton* v.

Harris, 489 U. S. 378, 388 (1989). That standard is well met in this case.

I

I turn first to a contextual account of the *Brady* violations that infected Thompson's trials.

A

In the early morning hours of December 6, 1984, an assailant shot and killed Raymond T. Liuzza, Jr., son of a prominent New Orleans business executive, on the street fronting the victim's home. Only one witness saw the assailant. As recorded in two contemporaneous police reports, that eyewitness initially described the assailant as African-American, six feet tall, with "close cut hair." Record EX2–EX3, EX9.[1] Thompson is five feet eight inches tall and, at the time of the murder, styled his hair in a large "Afro." *Id.*, at EX13. The police reports of the witness' immediate identification were not disclosed to Thompson or to the court.

While engaged in the murder investigation, the Orleans Parish prosecutors linked Thompson to another violent crime committed three weeks later. On December 28, an assailant attempted to rob three siblings at gunpoint. During the struggle, the perpetrator's blood stained the oldest child's pant leg. That blood, preserved on a swatch of fabric cut from the pant leg by a crime scene analyst, was eventually tested. The test conclusively established that the perpetrator's blood was type B. *Id.*, at EX151. Thompson's blood is type O. His prosecutors failed to disclose the existence of the swatch or the test results.

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[1] Exhibits entered into evidence in Thompson's §1983 trial are herein cited by reference to the page number in the exhibit binder compiled by the District Court and included in the record on appeal.

B

One month after the Liuzza murder, Richard Perkins, a man who knew Thompson, approached the Liuzza family. Perkins did so after the family's announcement of a $15,000 reward for information leading to the murderer's conviction. Police officers surreptitiously recorded the Perkins-Liuzza conversations.[2] As documented on tape, Perkins told the family, "I don't mind helping [you] catch [the perpetrator], . . . but I would like [you] to help me and, you know, I'll help [you]." *Id.*, at EX479, EX481. Once the family assured Perkins, "we're on your side, we want to try and help you," *id.*, at EX481, Perkins intimated that Thompson and another man, Kevin Freeman, had been involved in Liuzza's murder. Perkins thereafter told the police what he had learned from Freeman about the murder, and that information was recorded in a police report. Based on Perkins' account, Thompson and Freeman were arrested on murder charges.

Freeman was six feet tall and went by the name "Kojak" because he kept his hair so closely trimmed that his scalp was visible. Unlike Thompson, Freeman fit the eyewitness' initial description of the Liuzza assailant's height and hair style. As the Court notes, *ante*, at 4, n. 2, Freeman became the key witness for the prosecution at Thompson's trial for the murder of Liuzza.

After Thompson's arrest for the Liuzza murder, the father of the armed robbery victims saw a newspaper photo of Thompson with a large Afro hairstyle and showed

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[2]The majority endorses the Fifth Circuit's conclusion that, when Thompson was tried for murder, no *Brady* violation occurred with respect to these audio tapes "[b]ecause defense counsel had knowledge of such evidence and could easily have requested access from the prosecution." *Thompson* v. *Cain*, 161 F. 3d 802, 806–807 (1998); *ante*, at 17, n. 11. The basis for that asserted "knowledge" is a mystery. The recordings secretly made did not come to light until long after Thompson's trials.

it to his children. He reported to the District Attorney's Office that the children had identified Thompson as their attacker, and the children then picked that same photo out of a "photographic lineup." Record EX120, EX642–EX643. Indicting Thompson on the basis of these questionable identifications, the District Attorney's Office did not pause to test the pant leg swatch dyed by the perpetrator's blood. This lapse ignored or overlooked a prosecutor's notation that the Office "may wish to do [a] blood test." *Id.*, at EX122.

The murder trial was scheduled to begin in mid-March 1985. Armed with the later indictment against Thompson for robbery, however, the prosecutors made a strategic choice: They switched the order of the two trials, proceeding first on the robbery indictment. *Id.*, at EX128–EX129. Their aim was twofold. A robbery conviction gained first would serve to inhibit Thompson from testifying in his own defense at the murder trial, for the prior conviction could be used to impeach his credibility. In addition, an armed robbery conviction could be invoked at the penalty phase of the murder trial in support of the prosecution's plea for the death penalty. *Id.*, at 682.

Recognizing the need for an effective prosecution team, petitioner Harry F. Connick, District Attorney for the Parish of Orleans, appointed his third-in-command, Eric Dubelier, as special prosecutor in both cases. Dubelier enlisted Jim Williams to try the armed robbery case and to assist him in the murder case. Gerry Deegan assisted Williams in the armed robbery case. Bruce Whittaker, the fourth prosecutor involved in the cases, had approved Thompson's armed robbery indictment.[3]

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[3]At the time of their assignment, Dubelier had served in the District Attorney's Office for three and a half years, Williams, for four and a half years, Deegan, a recent law school graduate, for less than one year, and Whittaker, for three years.